Editor's Note: Reconsideration denied by order dated November 3, 1999

ROBERT W. HALL, ET AL.

IBLA 98-108, 98-192 Decided June 8, 1999

Appeals from a Decision Record issued by the Las Vegas District Office, Bureau of Land Management, authorizing the issuance of two mineral material sale contracts for sand and gravel and from two decisions of the same office relating to issuance of those contracts. EA NV-053-97-046, N-61787, N-61788.

Appeal dismissed in part; Decision Record affirmed as modified; contract decisions affirmed.

1. Environmental Quality: Generally--Environmental Quality: Environmental Statements

   Under the Clean Air Act, a Federal agency may not approve any activity which fails to conform to a state implementation plan. A conformity determination is required for each pollutant when the total of direct and indirect emissions caused by a Federal action in a nonattainment area would equal or exceed certain rates.

2. Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact

   A Decision Record approving the issuance of contracts for the sale of four million tons of sand and gravel from Federal lands and finding no significant impact from that sale will be affirmed when BLM has taken a hard look at the environmental consequences of the sales in accordance with section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (1994), and there is no evidence that BLM failed to consider adequately a substantial environmental problem of material significance.

APPEARANCES: Robert W. Hall, Esq., Las Vegas, Nevada, pro se and on behalf of Nevada Environmental Coalition; Frederick P. Schuster, Banning, California, for Thunder Consulting; Paul E. Larson, Esq., Las Vegas, Nevada, for Triple Five Nevada Development Corporation; Mark R. Chatterton, Assistant District Manager, Las Vegas District Office, Bureau of Land Management, Las Vegas, Nevada, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

On November 18, 1997, the Assistant District Manager, Nonrenewable Resources, Las Vegas District Office, Bureau of Land Management (BLM), issued a Decision Record (DR) supported by Environmental Assessment (EA) NV-053-97-046. The DR included a Finding of No Significant Impact. In the DR, the Assistant District Manager announced his decision to

> [a]pprove the "Proposed Action" as contained in Environmental Assessment NV-053-97-046. This includes the sale of four million tons of sand and gravel through competitive sale to Diamond Construction and American Sand and Gravel, temporarily moving Western States Contracting into T. 19 S., R. 59 E., sec. 36, S1/2NE1/4SE1/4 and the competitive sale of two million tons of sand and gravel in this same area, and continued sales in the rest of the area analyzed.

(DR at 1.)

In addition, on the same date he issued a decision to Diamond Construction Company (Diamond) notifying it that it had submitted the high bid for lot 3 in the Lone Mountain Community Pit and requiring, within 30 days of receipt of the decision, the submission of a mine plan, the payment of a bond, and the execution of material sale contract N-61787. He also issued a decision to American Sand & Gravel, L.L.C. (American), on November 18, 1997, naming it the high bidder for lot 4 in the Lone Mountain Community Pit. He required American to submit a mine plan, pay a bond, and execute material sale contract N-61788 within 30 days of receipt of the decision.

On December 17, 1997, Robert W. Hall, as an individual and as the Chairman of the ad hoc environmental group known as the Nevada Environmental Coalition, filed an appeal of the DR and the two material sale contract decisions. On the same day, Frederick P. Schuster of Thunder Consulting filed an appeal of the DR. The Board docketed these appeals as IBLA 98-108. In addition, Triple Five Nevada Development Corporation (Triple Five) also filed an appeal of the DR and the two material sale contract decisions. The Board docketed Triple Five's appeal as IBLA 98-192. Schuster has not filed any statement of reasons in support of his appeal. Failure to file a statement of reasons subjects the appeal to summary dismissal. 43 C.F.R. § 4.402(a). Accordingly, Schuster's appeal is properly dismissed. See United States v. De Fisher, 92 IBLA 226, 227 (1986). 1/

1/ Even if Schuster had filed a statement of reasons for appeal, his appeal would be subject to dismissal. On Sept. 29, 1997, the Board issued an order to show cause in IBLA 97-432, an appeal filed by Schuster, acting as Thunder Consulting, challenging an advertisement and instructions for bidders that offered 22,000,000 tons of pit run sand and gravel for sale in the Lone Mountain Community Pit. We directed Schuster to address two issues: whether the appeal was premature and whether the appeal had been

The appeal filed by Hall, on his own behalf and for Nevada Environmental Coalition, focuses on the effect of BLM's actions on air pollution levels in the Las Vegas Valley. Triple Five adopted and incorporated Hall's reasons for appeal as part of its own. Hall states:

> This appeal is an allegation that the Nevada BLM has evaded the language, spirit and intent of all applicable environmental laws by the device of cutting up into little pieces, its statutory and regulatory environmental responsibilities concerning its air pollution activities in the Las Vegas Valley non-attainment area for PM10 and CO [carbon monoxide]. [2/] By the "little piece" device, it is obvious that the Nevada BLM hoped that no one would notice. Regardless of the intent, the result is a serious, willful evasion of federal and state environmental law. The intent of this appeal is to determine the scope and depth of the evasion and once the problem is clearly understood, bring the Nevada BLM into compliance with the language, spirit and intent of the law.

(Statement of Reasons (SOR) at 2.)

The thrust of Hall's appeal is that the 1997 EA is confusing and misleading because it fails to address adequately the scope of BLM's activity. It is Hall's position that the area which should have been addressed by BLM was the entire Las Vegas Valley and that it should have assessed the impact of all of its activities in the valley. At page 27 of the SOR, Hall charges that:

> The BLM must comply with the CAA [Clean Air Act] and consider all emissions in a conformity determination that includes all

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fn. 1 (continued)
filed by one not authorized to practice before the Department of the Interior, as set forth 43 C.F.R. § 1.3. We noted in our order that it appeared that Schuster was not authorized to practice before the Department of the Interior in accordance with 43 C.F.R. § 1.3(b), based on the fact that in that appeal, as in the present appeal, he allegedly was acting on behalf of various homeowner groups in the Lone Mountain area. The term "practice" is defined by 43 C.F.R. § 1.2(c) to include any action taken to assert a right before the Department; one who files a notice of appeal from a BLM decision is practicing before the Department. Building and Construction Trades Council of Northern Nevada, 139 IBLA 115, 116 (1997); Southern Utah Wilderness Alliance, 108 IBLA 318, 321 (1989). In an order dated Oct. 30, 1997, we dismissed IBLA 97-432 following receipt from Schuster of a document styled "Motion to Dismiss."

2/ In the EA at 10, BLM stated that "[a]ir quality would be impacted by operations. Dust and other air pollutants would be generated during mining and reclamation. The Las Vegas Valley has been classified as a serious non-attainment area for carbon monoxide and particulate matter less than or equal to 10 micro[ns] (PM10)."

> of that Federal agency's Las Vegas Valley activities, not just the instant EA. The Federal agency must also comply with NEPA [National Environmental Policy Act of 1969]. This includes all of the air pollution emissions BLM admits will occur in their instant environmental assessment ("EA") and all other BLM activities in the Las Vegas Valley.

(SOR at 27.)

[1] Under the CAA, a Federal agency may not approve any activity which fails to conform to a state implementation plan (SIP). 42 U.S.C. § 7506(c)(1) (1994); 40 C.F.R. § 93.150; see 42 U.S.C. § 7410 (1994). Any activity that a Federal agency engages in, or supports or approves, requires a "conformity determination" for each pollutant "where the total of direct and indirect emissions in a nonattainment area or maintenance area caused by a Federal action would equal or exceed any of the rates in paragraphs (b)(1) or (2)" of 40 C.F.R. § 93.153(b). See 40 C.F.R. § 93.152 for definitions. These rates were established so that Federal agencies do not have to make conformity determinations for actions that would have little impact on air quality. See 58 Fed. Reg. 63214, 63228-29 (Nov. 30, 1993); 58 Fed. Reg. 13836, 13842 (Mar. 15, 1993). The rates applicable under § 93.153(b)(1) in this case are 100 tons/year for CO and 70 tons/year for PM10.

The requirement for a conformity determination does not apply to an action where the total direct and indirect emissions are below the levels in § 93.153(b). 40 C.F.R. § 93.153(c)(1). Although BLM states that the EA was intended to serve as the conformity determination required under 40 C.F.R. §§ 6.303, 93.158, and 51.853, EA at 10, the analysis of CO and PM10 emissions therein supports the conclusion that the action approved in BLM's DR would not cause emissions in excess of the rates in § 93.153(b)(1) and therefore that no conformity determination was necessary.

The analysis of CO and PM10 emissions in the draft EA was submitted to the Clark County Department of Comprehensive Planning and to the Clark County Health District, Air Pollution Control Division. (EA at 25-26; BLM Answer at 1.) It was also sent to the State of Nevada Bureau of Air Quality and the Air Quality Section of the regional office of the U.S. Environmental Protection Agency. Id. The Department of Comprehensive Planning responded that its staff had concluded that "the proposed mitigating measures for air quality outlined in the EA should adequately regulate the generation of [CO] and PM10 pollutants at the Community Pit. Air pollution mitigation measures should be required for all new proposals and encouraged for all existing operations." (EA, Appendix B, Letter of September 25, 1997.) (BLM replied that "[t]he mitigation measures for air quality will be adopted as part of new operations as they come on line. Existing operations will be looked at for the potential to modify them." Id.) We find BLM has demonstrated its action was regarded by Clark County and the State of Nevada as exempt under 40 C.F.R. § 93.153(c)(1).

In the EA, BLM discusses CO on pages 10 through 13, concluding that "[n]o appreciable increase in CO levels will occur due to these operations." (EA at 13.) BLM's use of the words "these operations" is apparently a reference to language in the previous paragraph in which it stated that "[i]t is estimated that a total of 30 employees would travel to the pit and return home, a day. It is also estimated that the six operations would generate an average of 270 trucks hauling sand and gravel per day." (EA at 12.) BLM admitted that those totals could increase if the volume of materials increased or more operations were to open. It also noted that other present operations would add approximately 400 trucks per day.

BLM does not identify in the section of the EA related to CO the "six operations" to which it refers. Reviewing earlier pages of the EA, we find six companies discussed, three of which are identified only as the "[t]hree companies [that] currently obtain minerals noncompetitively from T. 20 S., R. 59 E., sec. 1, N1/2NE1/4." (EA at 6.) BLM explained that "[s]ales for this area would continue in this manner or be converted to competitive sales." Id. The other companies listed are Diamond, American, and Western States Contracting. 3/ BLM stated that only American would be "new to the area." Id. The trucks utilized by these five companies in their Lone Mountain operations and the estimated number to be utilized by American apparently constitute the average daily total announced by BLM on page 12 of the EA for "the six operations."

Hall criticizes BLM's discussion of CO in the EA. He asserts that the data relied on by BLM on page 12 of the EA is "out of date" because it only shows days of unhealthy exceedance of CO levels at a particular location in the Las Vegas Valley from 1981 to 1995. (SOR at 11.) Although that information shows a recent decline in exceedance days, Hall asserts that the EA is deficient in failing to explain why more recent data was not used. He claims that "more recent 1996 and 1997 data indicate that CO air pollution is increasing, not decreasing." (SOR at 11.) Hall does not, however, provide that data, claiming only that the point is moot because the Las Vegas Valley remains a serious CO nonattainment area.

Hall also asserts that CO emission estimates are based on yearly production figures and, thus, do not reflect true emissions if production rates are significantly higher. Hall's position is that rates are likely to be higher given past production figures for the 180-acre area examined in BLM's August 1992 Lone Mountain Community Pit EA-054-92-164, which had estimated removal of 300,000 cubic yards of material per year over a 10-year period. Actual figures set forth in Table 1 at page 5 of the EA

3/ On page 14 of the EA in its discussion of PM10, BLM provides a table showing estimated PM10 production for FY 98 for six operations. The operators listed are TCB Now, Pipes Paving, Quality S&G, Diamond, American, and Western States. The first three are the companies operating under noncompetitive contracts. See BLM letter to Thunder Consulting, dated July 16, 1997.

show that in FY's 93 through 97 over 2,265,000 cubic yards of material were removed from that area, reflecting a removal rate much greater than 300,000 cubic yards per year.

We note also that BLM does not provide any quantifiable figure for current CO emissions. Instead, its conclusion is that "[n]o appreciable increase in CO levels will occur due to these operations. The amounts of CO released into the atmosphere, even when added to that being produced by the other operations in the area, would be small in comparison to the overall total released in the valley." (EA at 13.) Nevertheless, BLM's conclusion appears to be grounded in its calculations regarding the number of trucks hauling material from the Lone Mountain area. As a result of BLM's approval of the proposed action in the EA, BLM estimates that "[i]f American Sand and Gravel were to produce 400,000 tons per year, then a total of 52 new trucks per day ((production divided by days per year) divided by tons per truck) could be added." (EA at 8.) Thus, BLM's position is that its approval of the proposed action in the EA will introduce "[n]o appreciable increase in CO levels." (EA at 13.)

As noted above, a conformity determination is required for a pollutant such as CO in a serious nonattainment area only where the total of direct and indirect emissions "caused by a Federal action" would equal or exceed 100 tons of CO per year. 40 C.F.R. § 93.153(b); see 40 C.F.R. § 93.153(c). Despite the lack of a quantifiable figure in the EA for present CO emissions, there is no evidence in the record that the Federal action analyzed in the EA and approved in the DR would result in the emission of 100 tons or more of CO per year. That appears to be true even if, as Hall charges, there is an acceleration of the removal of materials from the pit.

Also, we reject Hall's argument that "BLM must use agency totals, and not piecemeal sub-totals" in making a conformity determination for an activity. (SOR at 28.) We can find no support for his assertion that all of BLM's activities in the Las Vegas Valley must be considered in a conformity determination relating to CO.

We now turn to Hall's arguments concerning PM10 emissions. BLM stated in the EA at 15 that

> [t]otal PM10 emissions for FY97 [for the three noncompetitive operators] were calculated to be 56.42 tons. The total PM10 emissions projected for FY98, if three additional operators are added, is 125.77 tons. However, there would be a net increase of only 27.59 tons as two of the operators are already operating in the Lone Mountain area and would be shifting to new sites. This would also be with the three ongoing operations producing sand and gravel at a higher rate than they did in FY97.

Hall objects to this statement by BLM, asserting that BLM's figures fail to consider impacts "for hauling on the paved roads to the final destination" because the final delivery point is within the same nonattainment area. (SOR at 13.) We find little basis for this claim by

Hall. There would be little PM10 emissions from trucks traveling on paved roads, particularly in light of mitigation measure No. 5 to be included in the General Stipulations section of the contracts requiring that "[a]ll sand and gravel trucks will use load covers when transporting mineral materials." See DR at 2.

Hall also charges that any estimate by BLM of PM10 emissions is low because it fails to consider the past history of production by operators in the pit. Hall fails to establish, however, even assuming increased production, that levels of PM10 emissions attributable to the proposed action approved in the DR would even approach that necessary to trigger the requirement to prepare a conformity determination under 40 C.F.R. § 93.153(b). Included in the EA are two tables (Table 5 and Table 6) at pages 15-16. One shows the various sources for valley-wide PM10 emissions for the year 1995 and the other includes projections for those same sources for the year 2001. BLM derived the information for its tables from Clark County's 1997 Final Report on PM10 emissions.

BLM's table for 1995 shows the major contributors to PM10 emissions to be construction activities and wind erosion from undisturbed vacant land, which together account for nearly 70 percent of total emissions. The table for 2001 shows those activities contributing a slightly larger percentage. BLM explained at page 16 of the EA:

> Sand and gravel operations are considered to be stationary sources. When compared to the total annual valley-wide PM10 emissions projected for the year 2001, for stationary sources, the projected FY98 emissions would amount to approximately 1/16th of the total. As can be seen from the table stationary sources account for only 2.1 percent of the PM10 emissions in the valley. This project would amount to 0.14% of that total.

Thus, the proposed action will not result in any substantial increase in PM10 emissions. We reject Hall's argument that BLM must include "all of that Federal agency's Las Vegas Valley activities" (SOR at 27) in a conformity determination relating to PM10.

The DR listed 13 mitigation measures to be included as general stipulations in the material sale contracts. The majority of those measures are directed at procedures for reducing the air pollution.

Hall argues that mitigation measure No. 1 requiring that the operator obtain a Various Location Operating Permit from Clark County is improper because "§0.150, rev. 4/24/97, various location activity, §0.138, Temporary Stationary Source, and §12.1.3.1(a)(5), rev. 6/26/97 of the current SIP requires that a VLP [Various Location Permit] not have PM10 emissions which exceed 15 tpy." (SOR at 14.) Hall asserts that the EA shows both Diamond and American with emissions "far in excess of the 15 tpy threshold." Id. Hall has not provided the Board with copies of the cited material, and BLM does not address this charge in its answer. Thus, the present record provides no basis for disturbing BLM's action.

We note that Clark County's 1997 Final Report provides at B-14 of Appendix B that "[t]he Clark County Health District APCD [Air Pollution Control District] permits all stationary/industrial pollution emission sources for Clark County. Any short-term/temporary or long-term PM10 emissions from a point source, including sand and gravel operations, would require a permit from APCD." Thus, even to the extent Hall might be correct, both Diamond and American would be required to obtain the necessary emissions permit from the county. BLM should review the language of mitigation measure No. 1 to insure that it accurately reflects the proper permit required to be obtained by the operator.

Hall points to language of mitigation measure No. 2 in the EA at page 17, stating that "[a]ll operations should use best available control measures to meet air quality regulations." 4/ Hall contends that "best available control measures" (BACM) is not the requirement; rather, what is required is "best available control technology" (BACT). Hall asserts that the two terms are not the same. We agree with Hall. Clark County's 1997 Final Report states that the reclassification of the Las Vegas Valley from a moderate nonattainment area to a serious nonattainment area in January 1993 mandated the introduction of new controls. "These increased controls include best available control measures (BACM) for mobile and area sources of PM10 and the application of best available control technology (BACT) to stationary sources. The BAMC (BACT) controls are required to be implemented no later than February 8, 1997." (Final Report at 2.) The operations in question are, as noted at page 16 of the EA, considered to be stationary sources. Accordingly, BACT must be applied to them. BLM is directed to amend mitigation measure No. 2 at page 1 of the DR to insert the term "best available control technology."

Mitigation measure No. 3 relates to moisture content requirements for excavated materials providing that they will contain not less than 2 percent moisture by weight. The last sentence of that measure, as set forth on page 2 of the DR, provides that "[t]esting for moisture content will be required as requested." Hall questions who will conduct the testing. He asserts that testing for moisture content compliance must be required. It is unclear from the language of the measure who will enforce the moisture content requirement or who the requester will be. Because the purpose of the mitigation measure is to limit PM10 emissions, BLM is directed to include language in the measure requiring moisture content testing on some regular basis such that the results of that testing may be reviewed for compliance with the mitigation measure.

4/ Hall complains generally regarding the mitigation measures that the "repeated use of the word 'should' in the list of mitigation measures is inappropriate and misleading." (SOR at 14.) Hall has focused on the language included in the EA. The language of the mitigation measures in the DR is mandatory, employing the word "will."

Hall scoffs at the mitigation measure No. 7 requirement that BLM will suspend the contract of any operations failing to meet air quality regulations, if requested to do so by the Clark County Health District. Hall's position is that the county is lax in its enforcement of air pollution requirements. We have no knowledge of the county's enforcement policies. However, we note that the same mitigation measure calls for BLM to suspend the contract in certain circumstances, regardless of any request from the county. Hall has established no inadequacy in mitigation measure No. 7.

The cumulative effects determination in the EA is inadequate, Hall charges. He asserts that "[i]n order to meet the requirements of the law, the BLM must list each non-attainment area activity and their [sic] direct and indirect air pollution emissions, along with a running total for the entire non-attainment area." (SOR at 16.) We find no support for such a position.

[2] It is well established that a BLM decision to proceed with a proposed action, absent preparation of an environmental impact statement (EIS), will be held to comply with section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (1994), if the record demonstrates that BLM has, considering all relevant matters of environmental concern, taken a "hard look" at potential environmental impacts, and made a convincing case that no significant impact will result therefrom, or that such impact will be reduced to insignificance by the adoption of appropriate mitigation measures. Nez Perce Tribal Executive Committee, 120 IBLA 34, 37-38 (1991), and cases cited. An appellant seeking to overcome such a decision must carry its burden of demonstrating, with objective proof, that BLM failed to consider adequately a substantial environmental question of material significance to the proposed action or otherwise failed to abide by section 102(2)(C) of NEPA. Southern Utah Wilderness Alliance, 127 IBLA 331, 350, 100 I.D. 370, 380 (1993) and cases cited. For the reasons stated above, we find that BLM has taken a "hard look" at the potential impacts of the proposed action on air quality and that Hall has failed to establish a NEPA violation in this case.

Triple Five asserts that it is developing residential homes in the immediate vicinity of the Lone Mountain Community Pit for which it has received all necessary permits. Triple Five asserts that the EA fails to consider the effect PM10 and CO emissions of the proposed action will have on its development. BLM argues, in response to Triple Five's assertion, that Triple Five has not started any construction activities and provides no starting date for construction. Clearly, there can be no present effect on Triple Five's development. As discussed above, the EA provides a reasoned analysis of the impacts of the proposed action on PM10 and CO emissions. Given the discussion in the EA of the sources of PM10 emissions in the nonattainment area, it would appear that any construction activities undertaken by Triple Five would have a greater impact on PM10 emissions than the proposed action in the community pit.

Triple Five charges that the EA fails to consider residential development in the Lone Mountain area by developers other than Triple Five and

fails to consider the impact on public recreational projects also scheduled for Lone Mountain. Triple Five provides copies of preliminary parcel maps for its development, a copy of an aerial photograph showing overall real property development in the Lone Mountain area, and a copy of a site plan drawing for a park in the Lone Mountain area; however, Triple Five does not provide any supporting documentation to show that there will be any adverse affects on such development from the proposed action.

Triple Five asserts that the EA focuses only on the Lone Mountain community pit and fails to consider the "area immediately west of Lone Mountain itself, which surrounds the Appellant's residential development, and which the BLM has programmed for gravel and aggregate removal over the next 30 years." (Triple Five SOR at 2.) Triple Five attaches a copy of a map of what it represents to be that area. BLM responds that the map shows an area north of the area slated by Triple Five for development and that the EA did address activities in that area. BLM asserts that there is no plan to remove sand and gravel from the community pit to the west of Triple Five's property.

Triple Five asserts that the conclusion of the EA that the proposed action will not significantly affect the surrounding human environment is "flawed and fallacious." (Triple Five SOR at 3.) It contends that an EIS must be prepared. As set forth above, the record shows that BLM took a hard look at the potential environmental consequences of its proposed action and determined that there would not be a significant impact from the proposed action. Triple Five's unsupported assertion that the EA is flawed and fallacious provides no basis for overturning BLM's DR.

To the extent Hall and Triple Five have raised arguments not specifically addressed herein, they have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the appeal of Frederick P. Schuster is dismissed. BLM's DR is affirmed as modified by this opinion and its decisions on contract issuance are affirmed.

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Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

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Will A. Irwin
Administrative Judge